IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
Appellants,

against

F. O. MORGAN, doing business as F. O. MORGAN SHEEP COMMISSION COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEES

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Opinion Below

The opinion upon the order appealed from (R. 200-202), which was made and entered June 18, 1938, appears at R. 248 and is reported in 24 Fed. Supp. 214.

Jurisdiction

On October 10, 1938, this Court noted probable jurisdiction and postponed consideration of the motion to dismiss or affirm to the arguments upon the merits. The Government relies for jurisdiction upon Section 47(a), Title 28 U. S. C. (Act of October 22, 1913, c. 32, 38 Stat. 220), which Section 316 of the Packers and Stockyards Act of 1921 (7 U. S. C., § 217) makes applicable. Section 47(a)

permits a direct appeal to this Court only from a "final judgment or decree" of the statutory court. Section 47 permits a direct appeal to this Court from an order granting or denying an interlocutory injunction. No provision is made for any appeal from the granting of a temporary restraining order. The only cases relied on by appellants in their jurisdictional statement (p. 14) to sustain the jurisdiction of this Court are *B. & O. R. R. Co.* v. *United States et al.*, 279 U. S. 781; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; and *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1, rehearing denied, 304 U. S. 23.

The Government has not argued in its brief the question of jurisdiction. It is our contention that the appeal is not from a "final judgment or decree" but from a mere ministerial order appurtenant to the liquidation of a non-appealable temporary restraining order and required by the terms thereof. Since the Government has not argued the jurisdictional point, we will answer their substantive contentions in Part One of this brief and, in Part Two thereof, discuss the jurisdictional point.

Questions Presented

1. Whether a rate-fixing order made by the Secretary of Agriculture, and invalidated by this Court for a "vital defect" in the administrative hearing, may be validated *nunc pro tunc* as of the time, some five years ago, when the invalid order was made, notwithstanding that the Packers and Stockyards Act merely authorizes the Secretary in proceeding upon his own motion, as he did in this case, to make rates "thereafter to be observed" and "after full hearing."

2. Whether, when, in a suit to set aside a rate-fixing order, funds have been deposited in court by market agencies subject to the jurisdiction of the Secretary of Agriculture, as a condition of obtaining a temporary restraining order against the enforcement of his rates, which rates upon appeal this Court has held invalid, and which temporary restraining order permitted the collection by the market agencies of the rates in tariffs duly filed by them with the Secretary of Agriculture, it is mandatory for the Court to retain these impounded funds, after the cause before it has terminated, for the purpose of ultimately distributing the funds in accordance with a *nunc pro tunc* determination to be made by the Secretary as to what constituted reasonable rates during the period of the impounding, although they were impounded "pending final disposition of this cause."

3. Whether, upon this Court's reversing a decree of the statutory court which contains no provision concerning said impounded funds, and upon the statutory court's entering a decree of permanent injunction against the enforcement of the Secretary's rates fixed in the invalid order above-mentioned, and upon its ordering the return to the depositors of the funds deposited by them as security against the Secretary's order being held valid, this Court has jurisdiction to review the order of the statutory court as a "final judgment or decree," or whether the order being appurtenant to the liquidation of a non-appealable temporary restraining order and compelled by its terms, and requiring no action upon the part of any one but the clerk, it is a non-appealable ministerial order.

Statement

This case is here for the third time. The Court has rendered three opinions therein. *Morgan* v. *U. S.*, 298 U. S. 468, 304 U. S. 1, rehearing denied, 304 U. S. 23, the final result being the invalidation of an order of the Secretary of Agriculture for a "vital defect", not a mere "irregularity in practice", in the hearing before him.

On June 14, 1933, the Secretary of Agriculture, purporting to find the rates in the tariffs on file with him to be unjust and unreasonable,[1] issued an order reducing maximum commission rates for selling livestock at the Kansas City Stock Yards (R. 18, 94). The commissionmen challenged this order by petitions to set aside in the District Court of the United States (specially constituted) for the Western District of Missouri (R. 1-128). That Court granted a temporary restraining order which, as extended, has continued in effect throughout this litigation without any temporary injunction (R. 129, 130, 171, 181). It was provided in this order that the petitioners might continue to collect their filed rates upon giving security to the consignors of livestock (the rate-payers) by impounding collections in excess of the Secretary's rates, "pending final disposition *of this cause*" (R. 130). After a hearing, the statutory Court refused permanent injunctions (R. 137, 171).

Upon appeal to this Court, the statutory Court's decree was reversed for failure to permit petitioners to try the issue of whether or not the Secretary had accorded them

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[1] In the Secretary's answer to the petition to set aside his order, he admitted that these rates, which displaced rates approved by his predecessor in 1923, were 10% lower than these rates of the Secretary (R. 230). The doctrine of *Arizona Grocery Company* v. *Atchison, etc. R. R.*, 284 U. S. 370, therefore, bars all reparation claims based on the lowered rates as any in this case must be.

the "full hearing" required by Section 310 of the Packers and Stockyards Act of 1921. *Morgan* v. *U. S.*, 298 U. S. 468. After a new hearing in the Court below, it again refused permanent injunctions and decreed that the petitions be dismissed (R. 180). Upon appeal, this Court, on April 25, 1938, again reversed the decree of the District Court and invalidated the Secretary's order for what it termed a "vital defect" in the hearing, "more than an irregularity in practice," (p. 22) and issued its mandate for further proceedings in conformity with its opinion and decree, as according to right and justice and the laws of the United States ought to be had (R. 182-183); *Morgan* v. *U. S.*, 304 U. S. 1, rehearing denied, 304 U. S. 23. Upon denying the petition for rehearing, it refused to give any directions to the court below concerning the disposition of the impounded funds.[2]

Pursuant to this mandate, the District Court entered its final decree permanently enjoining the Secretary's order (R. 203-204). At this time it held approximately $586,000 in funds impounded pursuant to its temporary restraining order, being the difference between the collections made by the commissionmen under their tariffs filed with the Secretary of Agriculture on May 11, 1932 (which tariffs the invalid order of the Secretary of Agriculture was unsuccessful in displacing) and the amounts which would have been collected under the Secretary's rates. The impound-

[2]It is needless for us to claim, as the Government in its brief asserts we do, that the release of the impounded funds followed automatically upon this Court's decision. The decree below (R. 180), which this Court reversed, contained no provision concerning the impounded funds. This, we presume, prevented this Court from considering the matter. We of course rely upon the effect of the decree below in granting a permanent injunction which made the continuance of a temporary restraining order unnecessary, and the action of the Court below in ordering the funds returned.

ing ceased November 1, 1937, when the Secretary and the commissionmen agreed on new rates for the future pursuant to a stipulation setting forth changed conditions (R. 191).

On the day after the mandate of this Court was filed, the District Court was moved by the appellants to stay the return of the impounded moneys to appellees on the ground that this Court's invalidation of the Secretary's order was not conclusive, it being represented and argued to the Court that the Secretary could reopen the proceedings and "validate" his invalid order *nunc pro tunc* as of June 14, 1933 (R. 185). It was further argued that in the event this should be done, the moneys deposited by the commissionmen as security for refunds in the event the Secretary's order had been held to be valid, would have to be returned to the consignors of livestock. The Court below rejected this argument and ordered the funds returned to the commissionmen, expressing the opinion that there was not the "faintest shadow of merit" in the contentions of the Secretary (R. 249) and no "shred of reason or law" in his proposal to make a *nunc pro tunc* order (R. 250). It further said that the funds were deposited upon the "clear understanding" that in the event the Secretary's order should be declared invalid, they would be returned to the commissionmen, and that it would be an act of "bad faith" on the part of the Court to refuse to return them (R. 249).

The Secretary brings this appeal from the order of the Court below directing the return of the impounded funds (R. 204, 208), alleging that it was mandatory for the Court to retain them, even after the termination of the cause before it, for a "reasonable time" to permit the Secretary to conduct proceedings designed to "validate" his invalid order. He does not appeal from the order denying him a stay of distribution.

Statutes Involved

The statute which governs the powers of the Secretary of Agriculture to regulate the rates and charges of the commissionmen at the Kansas City Stock Yards is Title III of the Packers and Stockyards Act of 1921, as amended (7 U. S. C., c. 9, §§181-229; c. 24, 42 Stat. 159 *et seq.*). The full text of this Title containing Sections 301 through 316, inclusive, is printed as an appendix to this brief. By reason of its length, it is not here set forth in full. The section of this Title which is most relevant upon this appeal is Section 310, which reads as follows:

> "SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—
>
> (a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and
>
> (b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that

it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

The statutory provisions which affect the jurisdiction of this Court are contained in the Packers and Stockyards Act and in the Interstate Commerce Act.

Section 316 (7 U. S. C., Sec. 217) of the Packers and Stockyards Act (7 U. S. C., c. 9, Sections 181-229; c. 64, 42 Stat. 159 et seq.) provides:

"For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217, inclusive, of this chapter, and to any person subject to the provisions of sections 201 to 217, inclusive, of this chapter (Aug. 15, 1921, c. 64, Sec. 316, 42 Stat. 168)."

The applicable provisions of the laws relating to suits brought to set aside, suspend or restrain the enforcement of orders of the Interstate Commerce Commission and to appeals in such suits are found in Title 28, U. S. C., Sections 44, 47, and 47a (Act of Oct. 22, 1913, c. 32, 38 Stat. 220).

Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a, and 48.

Section 47, after providing for the procedure in connection with the issuance of an interlocutory injunction; provides:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; * * *"

Section 47a provides in part as follows:

> "A *final judgment or decree* of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." (Italics ours.)

Section 238 of the Judicial Code, as amended (28 U. S. C. Sec. 345, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, 938), in so far as relevant, provides as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

"(1) * * *

"(2) * * *

"(3) * * *

"(4) So much of section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

"(5) * * *."

Summary of Argument

I.

Assuming, contrary to the plain terms of the statute, that the Secretary of Agriculture in a proceeding instituted on his own motion has the power to fix rates in the past by making at some time in the future a *nunc pro tunc* order dated as of June 14, 1933, this nevertheless would not confer power upon the statutory court to hold the impounded funds after the cause before it has terminated.

II.

Assuming the existence of power in the Secretary to make a *nunc pro tunc* order, and further assuming the existence of power in the statutory court to hold the impounded funds pending reopened proceedings before the Secretary, neither of which powers exists, the statutory court was nevertheless correct in concluding that the terms

of the temporary restraining order gave it no option but to return the impounded funds to the market agencies.

III.

There is no merit in the argument of appellants that when there has been a failure to comply with the fundamental procedural provisions of the statute, which are conditions precedent to the effectiveness of any rates fixed by the Secretary, the statutory court in dealing with an impounded fund must import into the case an issue of what were reasonable charges during the period of impounding. This being their fundamental premise, their appeal must fail.

IV.

The Secretary is without power to make a *nunc pro tunc,* pre-dated or retroactive order. Since it is conceded that no other type of order which he can make can affect the impounded funds, this appeal must fail.

1. Except in reparation cases, the statute forbids the Secretary to make orders governing completed transactions. Acting upon his own motion, as he does here, he can make only prospective rates.

2. The prior decisions of this Court in this case constitute a complete answer to the Government's contention that the so-called "procedural" defects by reason of which the Secretary's prior order was set aside, may now be corrected in such a way as to

permit the Secretary to enter a new order as of the date of the old.

3. Unless an order made now ought to have been made then, it cannot be issued *nunc pro tunc* even in a court proceeding.

4. Neither the *Atlantic Coast Line* case nor the other authorities cited by the appellants are in point.

V.

Whether or not the rate-payers are now barred from obtaining reparations has nothing to do with the merits of this appeal and is a question extrinsic to the record.

VI.

The affirmance of the lower court's decision will result in no injustice and will in no way hamper the proper carrying on of administrative proceedings. Moreover, the consequences of any other decision in this case would be absurd.

VII.

This appeal, not being from "a final judgment or decree," but from a mere ministerial order which, upon the termination of the cause, was required by the unambiguous terms of a non-appealable temporary restraining order, this Court lacks jurisdiction.

1. The statute limits appeal to a "final judgment or decree." Since the order appealed from is not a

"final judgment or decree," but is a mere ministerial order or direction to the Clerk authorizing the return of impounded funds such as was required by the unambiguous terms of a non-appealable temporary restraining order, which order or direction merely restores the *status quo ante* the temporary restraining order, this Court lacks jurisdiction.

2. The order appealed from, unlike the decree in the *Baltimore and Ohio* case, is not a decree resulting from an equity proceeding in which one party has asked restitution from the other, but is a mere ministerial order or direction to the Clerk, upon the occasion ceasing for the maintenance of security, to return moneys belonging to a litigant.

3. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is strictly consistent with the mandate of this Court. In reality, however, it was not required by the judgment or mandate of this Court, which reversed a decree containing no provision relating to the impounded funds, but is an order to which appellees became immediately entitled when the judgment of this Court absolved them from the necessity of maintaining a temporary restraining order in force.

4. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is not a decree which is part of or incidental to the appealable final decree in the main suit; it is a mere ministerial order, direction or instruction to the Clerk incidental to the termination or the dissolution of a non-appealable temporary restraining order.

ARGUMENT

PART ONE

THE ORDER OF THE STATUTORY COURT SHOULD BE AFFIRMED.

I.

Assuming, contrary to the plain terms of the statute, that the Secretary of Agriculture in a proceeding instituted on his own motion has the power to fix rates in the past by making at some time in the future a *nunc pro tunc* order dated as of June 14, 1933, this nevertheless would not confer power upon the statutory court to hold the impounded funds after the cause before it has terminated.

It is inconceivable that any type of administrative order, other than a *nunc pro tunc,* pre-dated or retroactive order, effective as of June 14, 1933, could possibly affect, or be enforced in court to affect, the funds impounded between June 14, 1933 and November 1, 1937. The appellants do not claim otherwise. It is elementary that a *nunc pro tunc* order must be one which could properly have been made at the time to which it is related back (Black on Judgments, 2d ed., 1902, § 133). This Court has said in no uncertain terms, as we show in Point IV, pp. 29-33, *post,* that no order ought to have been made on June 14, 1933. The power is to be exercised to correct clerical, not judicial, errors. *Id.,* § 132.

Concerning the proposal made by the Secretary to make at some time in the future such a retroactive, pre-dated or *nunc pro tunc* order, as of June 14, 1933, the statutory court, referring to Section 310 of the Packers and Stockyards Act of 1921, made the following very pertinent statement (R. 250):

> "We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges lawfully in effect then and thereafter has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed *'after full hearing'* (and there has been no such hearing), and that when they have been so determined and prescribed they shall 'be *thereafter* observed.'" (Italics ours.)

There are not a few other reasons, which we will later discuss, which effectively preclude the possibility of the Secretary's making any such *nunc pro tunc*, pre-dated or retroactive order. Let us assume, however, for the purpose of argument, that he has full power to do so. Nevertheless, it is entirely clear that the statutory court was right in concluding that it had no power to grant his request to retain in its possession the impounded funds pending any further proceedings before him, and that it was not even within its discretion to do so. The Secretary, however, cannot be content with insisting that the Court has discretionary power in the premises, because it has, by issuing the order appealed from, exercised any discretion it has in

favor of appellees, and has ordered the impounded funds returned to the market agencies and has refused to exercise its discretion in favor of the Secretary. No attempt has been made by him to show any abuse of discretion. He must insist, as he does, that it was *mandatory* for the court to hold these funds pending his proceeding to make a *nunc pro tunc*, pre-dated or retroactive order, as of June 14, 1933. He can, of course, cite no authority for any such proposition.

The only "cause" of which the statutory court ever obtained jurisdiction was the proceeding to set aside the Secretary's order. When, pursuant to the judgment and mandate of this Court, the statutory court entered its final decree granting a permanent injunction against the enforcement of this order, that "cause" terminated. This was the "cause," and the only "cause," in which the impounded funds could have been, or were, deposited (R. 129, 130). The litigation before the court having been completed, it is plain that it lacked power to do what the Secretary requested it to do; that is, to retain the impounded funds pending reopened proceedings before him. The statute (Title 28 U. S. C., § 44) permits the court only "to enjoin, set aside, annul, or suspend in whole or in part" an order of the Secretary of Agriculture. When one or more of these things have been done, the "cause" is terminated, except that the *status quo ante* may, of course, be restored. In fixing rates for the commissionmen at the stockyards, the Secretary acts as an arm of Congress. It would be quite as sensible to argue that a court has power to retain the impounded funds in order to afford Congress a reasonable opportunity to pass a retroactive statute.

The court had power to impose, as a condition of granting temporary relief in the form of a temporary restrain-

ing order, the provision for the impounding of part of appellees' collections. But when that temporary restraining order was no longer required as a result of the cause being terminated by a final decree granting a permanent injunction, it completely lacked power to retain the funds and was obligated to do as it did; that is, order the immediate return of the impounded funds to those who had put them up as security against an event which had failed to happen.

II.

Assuming the existence of power in the Secretary to make a *nunc pro tunc* order, and further assuming the existence of power in the statutory court to hold the impounded funds pending reopened proceedings before the Secretary, neither of which powers exists, the statutory court was nevertheless correct in concluding that the terms of the temporary restraining order gave it no option but to return the impounded funds to the market agencies.

In the preceding point, we have given some conclusive reasons why the Secretary can make no *nunc pro tunc*, predated or retroactive order and will later give a number of other reasons. We have also shown that, even if it could be held that the Secretary did have power to make such an order, the statutory court, as it correctly held, had no power, after the cause before it had terminated, to hold impounded funds while the Secretary should conduct his reopened proceedings. We now assume not only that the Secretary has the power to make such a *nunc pro tunc* order, but also that the court, generally speaking, if there be no particular im-

pediment to the exercise of the power, can hold the impounded funds while the Secretary conducts his reopened proceedings for the purpose of making his *nunc pro tunc*, pre-dated or retroactive order. Even, however, were both of these invalid assumptions valid, the statutory court could not in this case have retained the impounded funds.

The temporary restraining order leaves no doubt concerning the purpose for which these funds were impounded, to wit, security against the Secretary's order being held valid in the cause to set the order aside. That order (R. 129) restrains the Secretary from putting the rates fixed in his invalid order of June 14, 1933, into effect. It expressly permits the tariff rates regularly filed by appellees with the Secretary on May 11, 1932, to continue in effect.[1] The reason for these provisions is very clearly stated; that is, to prevent the irreparable damage to the market agencies which would ensue "in the event the relief in said petition prayed was finally granted by this Court" (that is, the setting aside of the Secretary's order), which irreparable damage would consist of the loss of the amounts by which their tariff rates exceeded the Secretary's rates (R. 129). The Secretary and all other persons seeking to take any action "in any wise militating against" the rights of petitioners to collect their tariff rates (R. 130), are enjoined

[1]Obviously, the scheme of the statute is such that either the Secretary's rates or the tariff rates filed with him by the market agencies had to be the effective rates during the period of impounding. The Government's entire argument, however, is based upon the contention that some other rates may have been the proper and reasonable rates during this period. It expressly contends that the Secretary in his new order may fix rates differing both from his invalid rates and from the tariff rates of the market agencies and that, if he does so, the impounded funds must be distributed in accordance with these rates. Of course, there never was any such issue in the case before the statutory court.

from doing so by enforcing the Secretary's rates. The deposits are to be made "pending final disposition of this cause" (R. 130). It is crystal clear that such deposits were made, as they always are in such cases, in lieu of a bond and as security against an event which never happened, to wit, the upholding of the Secretary's order in the courts. The provision that the names and addresses of the rate-payers "upon whose behalf" the amounts were collected, must be filed with the court, is nothing more than a requirement that those who are secured by the deposits be named.

All this the statutory court clearly recognized when, in referring to the impounded funds, it said (R. 249-250):

> "The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.
>
> "If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined."

The statutory court was clearly right. Such being the terms of the temporary restraining order pursuant to which the funds were impounded, there can be no doubt that,

whatever the power of the court, generally speaking, to retain impounded funds after the litigation before it has terminated, pending administrative proceedings, and whatever the power of the Secretary to make a *nunc pro tunc*, pre-dated or retroactive order in such proceedings, the return of the impounded funds was mandatory. The Government's argument that it was mandatory for the Court to retain the funds is wholly baseless.

III.

There is no merit in the argument of appellants that when there has been a failure to comply with the fundamental procedural provisions of the statute, which are conditions precedent to the effectiveness of any rates fixed by the Secretary, the statutory court in dealing with an impounded fund must import into the case an issue of what were reasonable charges during the period of impounding. This being their fundamental premise, their appeal must fail.

The answer to this argument is two-fold: First, that the failure of the Secretary to accord to the market agencies their statutory right to a "full hearing" was jurisdictional, for it is certainly true that the granting of a "full hearing" is a condition precedent to the making of a valid order. Moreover, this Court has said that the Secretary was guilty not of a mere "irregularity in practice" but that the hearing had contained a "vital defect" (304 U. S. 1, 22). As appears from the several opinions of this Court, there were in fact three separate and distinct reasons contributing to this

"vital defect." In the first place, the Secretary's procedure was such that neither by complaint, brief or proposed findings, or in any other way, were the Government's claims and contentions disclosed to the market agencies, the right to argue in such circumstances being futile. Second, the findings were not made by the Secretary upon his own consideration of the evidence, but by subordinates, including "the active prosecutors for the Government" (p. 24). Third, the Secretary held *ex parte* discussions with those representatives of the Government who had tried the case and who made the findings which he adopted *in toto*. The first two of these considerations go to a "full hearing." The last one goes to a "fair hearing." Certainly the denial of a "full hearing" is jurisdictional. The denial of a "fair hearing" under such circumstances would seem to suggest the necessity of suppressing the findings thus made, even if a wholly new trial could not be demanded. It is unnecessary to speculate further along these lines. The defects were clearly jurisdictional. But whether or not they were jurisdictional, there was a complete failure to comply with the essential and fundamental requirements of the statute which made the order wholly invalid.

Entirely aside, however, from the consideration of whether or not the Secretary's mistakes were merely procedural errors or were jurisdictional, it is perfectly clear that the argument made by appellants that so-called substantive rights survive such fundamental procedural delinquencies is wholly untenable. This argument is that, since Section 305 of the Act provides for just and reasonable rates and prohibits unjust and unreasonable rates, the ratepayers must thereby gain substantive rights which cannot be defeated by any merely procedural requirements of the statute. It is said that the impounded funds cannot be dis-

tributed until the Secretary has made an order which has either been upheld or set aside by the courts "on the merits."

Since the courts review the findings of administrative tribunals only to determine if they are supported by substantial evidence, there is in fact no review "on the merits," although that expression may be used colloquially to distinguish this ever-present question from other less frequently raised questions having to do with the regularity of the administrative proceedings. Nor, if it be true that the court must hold the impounded funds until the Secretary's order is either set aside or upheld by reason of its findings being unsupported or supported by substantial evidence, can any reason be discerned why the impounded funds should not be held until the administrative tribunal, which is both prosecutor and judge, confesses that it is unable to obtain substantial evidence to support its necessary and pertinent findings.

But it is plainly and necessarily untrue that failure to follow the procedural provisions of the Act cannot prejudice so-called substantive rights. There are no such things as just and reasonable rates or unjust and unreasonable rates in the abstract. The Government itself has uniformly argued in this case that there is nothing to prevent the Secretary from making any rates he chooses for the personal services of commissionmen, provided he considers all the relevant factors. Certainly the Act itself provides no criteria or standards of reasonableness. If the market agencies duly and regularly file their tariffs of rates with the Secretary, and they become effective by reason of Section 306 of the Act, they are authorized by the statute to collect them, no matter how unjust or unreasonable they may be, barring legal and valid action by the Secretary. He can, by Section 306(e), suspend a filed tariff for sixty

days, but for sixty days only. At the expiration of sixty days the market agencies are legally entitled to collect the rates prescribed by their filed tariffs. These collections are, however, subject to reparation claims, *but only if complaints for reparation are filed with the Secretary within ninety days after the cause of action arose.* The Secretary is expressly prohibited from awarding reparation on his own motion (Section 309(c)). Thus, no matter how unreasonable or unjust the rates collected have been, there is absolutely no remedy remaining in the rate-payers unless they have complied with the purely procedural provisions of the statute. Of course, the Secretary may on his own motion at any time, "after full hearing," hold that the rates in filed tariffs are unreasonable and displace these rates by lower schedules. He can, however, only make rates "thereafter to be observed" (Sec. 310(a)).

Lastly, upon the doctrine of the *Arizona Grocery* case (284 U. S. 370), if the market agencies, as they did in our case, file schedules of rates lower than rates fixed by the Secretary at some time in the past, it does not matter how unjust and unreasonable these rates may be in the light of changed conditions, they nevertheless can never be the subject of reparation proceedings. Here, again, we see that the mere failure of the Secretary to take note of changed conditions effectively deprives the rate-payers of all protection.

Again, looking at the statute from the standpoint of the market agencies, who, after all, must also have some so-called substantive rights, it is noted that Section 305 says that they may charge just and reasonable rates. Yet, if they do not, in accordance with the procedure set up by the statute, file schedules of rates with the Secretary, they are absolutely unprotected in their so-called substantive

rights, no matter how just and reasonable the rates they may have charged have been in fact. In other words, failure to comply with the procedural provisions of the statute raises conclusive presumptions in all of the above cases, and whether or not the rates were in fact unjust and unreasonable has nothing to do with the matter.

The argument in the Government's brief that this Court has power to mold the statute to effect substantive justice is significant. It really means that the claim is being made that this Court has power to ignore the express provisions of the statute. It also means that the Court is being asked to import into this case an issue which has never been in it, to wit, the issue of what would have been reasonable charges for the appellees to make during the period June 14, 1933 to November 1, 1937. It is insisted that general equitable principles require that the impounded funds be distributed only in accordance with such reasonable rates. But neither the court nor the Secretary, acting on his own motion merely, can fix reasonable rates for a past period. The only issue before the statutory court at the times it passed on the case before it, and the only issue which has ever been before it, has been that of the regularity of the proceedings before the Secretary of Agriculture. Either the rates prescribed in the tariffs filed by the market agencies were in force during the impounding period, or the Secretary's rates were. When the Secretary's order was invalidated by this Court, the only remaining alternative was that the tariff rates were in force. No talk about equitable jurisdiction to avoid multiplicity of suits by reason of probably non-existent reparation claims can conceal the fact that the rate-payers have no legal or equitable rights in this fund, even conceding that the quasi-

judicial tribunal known as the Secretary of Agriculture has any status to volunteer to enforce their rights.

The above considerations also dispose of the attempted analogy between appellate review of lower court decisions and judicial review of the decisions of administrative tribunals. These two types of review are obviously quite different in character. Entirely aside from this, moreover, the Packers and Stockyards Act, like the Interstate Commerce Act, has been molded on the theory that the constitutional powers of an administrative tribunal differ radically from those of a court. It is for this reason that in the Packers and Stockyards Act the Secretary of Agriculture is denied the power to make reparation orders which relate to the past, except upon complaint from the interested party; and it is provided that these reparation orders, when made, shall be only *prima facie* evidence of the fact (Section 308 (*f*)). In other words, the Secretary, acting on his own motion, can only make prospective rates. On the other hand, courts are fully authorized to deal with the past. In the case of a court, therefore, when it is allowed to correct a procedural error, there is usually no necessity of its designating as of what date the decision is made. Whenever made, it controls the past facts. But in this case, that is the whole point, The Secretary can accomplish nothing with respect to the impounded funds by anything other than a *nunc pro tunc,* pre-dated or retroactive order. Such an order he cannot make upon his own motion because it is equivalent to awarding reparation for the past. We do not need to claim that the Secretary cannot begin with the old record or even that he cannot employ the old findings as tentative findings. All we need claim is that the order, when made, cannot be dated back. This claim is plainly valid.

IV.

The Secretary is without power to make a *nunc pro tunc*, pre-dated or retroactive order. Since it is conceded that no other type of order which he can make can affect the impounded funds, this appeal must fail.

1. Except in reparation cases, the statute forbids the Secretary to make orders governing completed transactions. Acting upon his own motion, as he does here, he can make only prospective rates.

The scheme of Title III of the Packers and Stockyards Act of 1921 for determining what are just and reasonable rates and charges and preventing the collection of unjust and unreasonable rates and charges, is very much like that of the Interstate Commerce Act. The market agencies are required to file tariffs of rates and charges which they consider just and reasonable (Section 306). The rates and charges in these filed tariffs, in the absence of action by the Secretary of Agriculture, are presumed to be reasonable. They must be collected under pain of civil and criminal penalties (Section 306(f), (g) and (h)). Reparation for damages suffered by reason of being compelled to pay unjust and unreasonable rates can only be obtained by filing a complaint with the Secretary within ninety days after the cause of action has accrued, the order of the Secretary upon such complaint being *prima facie* evidence of the facts therein stated in the suit which must be brought in a district court of the United States to collect these damages (Sections 308 and 309). The Secretary is also authorized at any time to institute "an inquiry on his own motion, in

any case and as to any matter or thing concerning which a complaint is authorized to be made." In such an inquiry he can make any order "except orders for the payment of money" (Section 309(c)). Thus, in proceeding on his own motion, as the Secretary did in this case, he is expressly prohibited from making a reparation order. He may, however, "after full hearing," if he is of the opinion that any rate or charge of a market agency for stockyard services "is or will be unjust, unreasonable or discriminatory," "determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case" (Section 310(a)). He also has the power to issue a cease-and-desist order against such unreasonable rates and the publishing and demanding or collection thereof (Section 310(b)).

2. The prior decisions of this Court in this case constitute a complete answer to the Government's contention that the so-called "procedural" defects by reason of which the Secretary's prior order was set aside, may now be corrected in such a way as to permit the Secretary to enter a new order as of the date of the old.

The Government argues that, in analogy to the asserted power of a court in similar circumstances, the Secretary can make an order *nunc pro tunc* as of June 14, 1933, by giving or pretending to give at this time the "full hearing" to the market agencies which this Court has held he denied them at that time. The impounded funds must, it is claimed, be held by the court upon the speculative possibility that after listening to the arguments of the market agencies upon their exceptions to the tentative findings (the same as the old invalid findings), and after hearing evidence as

to the conditions during the years 1933-1937, when the funds were impounded, the Secretary may arrive at the same result as he did before, to wit, the same findings and the same rates.

It is conceded, however, that he may not arrive at the same result and may be sufficiently persuaded by the argument which he has not heretofore heard, and by the new evidence, to make other findings and other rates. Presumably, the Government will hardly contend that in such case the order can be dated back to June 14, 1933. It would seem that it would have to be admitted that different findings and different rates would require purely prospective treatment.[2] If the Government's consistently maintained theory that the Secretary does not have to set rates which will permit even an indisputably efficient market agency to make money, be correct, the Secretary need only watch his procedural step, take all relevant factors into consideration, and any rates he makes will be immune from attack. It is therefore obvious that if he be of a mind to, as his public statements clearly indicate that he is (Appellants' Bf., p. 96), he can very easily arrive at the same findings and rates contained in the old order. The question, therefore, as to whether he can date his order back is highly important.

The proceedings in which the order heretofore set aside was entered were instituted by the Secretary on his own motion. In such a proceeding the Secretary may not award reparation or make any order affecting the validity

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[2]This of itself is sufficient to deflate the Government's argument which is to the effect that Section 305 of the Act permits no rates other than those determined by the Secretary to be reasonable to be charged at any time in the past, no matter what procedural errors may have been made, these, it is claimed, all being correctible *nunc pro tunc*.

of charges theretofore collected. His power is limited to the fixing of reasonable rates for the future (*Packers & Stockyards Act*, § 310).

The Secretary's order of June 14, 1933 was set aside by this Court by reason of the Secretary's failure to accord to the respondents that "full, fair and open" hearing required by the statute as prerequisite to the entry of a valid order establishing rates for the future. The Government throughout its brief treats the defect by reason of which the order was set aside as a "procedural" defect. It then says, what we need not dispute, that administrative officers and tribunals like courts may correct their own "procedural" errors. Throughout its brief the Government treats the failure of the Secretary, under the facts of this case, to serve upon the respondents as a tentative report, the findings and order prepared by his subordinates including the "active prosecutors for the Government" and adopted and accepted by him, or to otherwise adequately advise them of the Department's claims and contentions, as something going merely to the form of the Secretary's procedure. But that which the Government regards as merely "procedural" and formal this Court regarded as fundamental and as constituting a denial to the respondents of the substance of a full and fair hearing. The Court states that plaintiffs' contention was "that the Secretary's order was made without the hearing required by the statute." This question, the Court says

> "goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature" (304 U. S. 1, at p. 14).

A "fair and open hearing" is said to be an inexorable safeguard of the rights of those dealt with by such agencies. Congress, it is said,

> "explicitly recognized and emphasized this requirement by making his [the Secretary's] action depend upon a *'full hearing'*" (p. 15).

The Court points out that

> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" (p. 19).

It then points out that in this case the Secretary accepted and made his own the findings which had been prepared

> "by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (p. 22).

That, the Court said:

> "is more than an irregularity in practice; it is a vital defect" (p. 22).

No opportunity, the Court says,

> "was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order" (p. 17).

In its opinion on the second appeal and on petition for rehearing the Court points out that while service of a tentative

report is not in every case essential to the validity of administrative orders, that which

> "would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (pp. 25-26).

In its opinion on petition for rehearing the Court points out

> "that findings of fact necessary to sustain the order had not been made by him [the Secretary] upon his own consideration of the evidence but as stated below" (p. 24).

These findings, said the Court,

> "prepared not by the Secretary but by those who had prosecuted the case for the Government, were adopted by the Secretary with certain rate alterations. No opportunity was afforded to the plaintiffs for the examination of the findings thus prepared until they were served with the Secretary's order and their request for a rehearing was denied" (p. 24).

It was by reason of such conduct upon the part of the Secretary that the Court held that the Secretary had not accorded to the respondent "the rudimentary requirements of fair play" (p. 15), and because of his failure so to do set the order aside.

Failure so to do, as the Court said, constitutes

> "more than an irregularity in practice; it is a vital defect" (p. 26).

The error committed by the Secretary was therefore not a mere "procedural" error of a formal character, subject to being corrected by a subsequent order dated back to the date of the first. It was fundamental and of substance because the respondents had been denied by the Secretary that full hearing which is a prerequisite to the validity of any rate-fixing order which the Secretary may make, the only order which he was empowered to make in the proceedings before him.

Unless under the facts of this case the service of a tentative report containing the findings and proposed order as prepared by the "active prosecutors for the Government" was a mere matter of form, to be followed as a matter of course by their adoption by the Secretary, it is plain that no order may now be entered as of the date of the order set aside without again denying to the respondents that full, fair and open hearing required by the statute and by the due process clause of the Constitution. That it was not a matter of mere form admits of no doubt. The purpose of such service, as pointed out by the Court in its several opinions in this case, would be to apprise the respondents of the findings made so as to give them opportunity to take exceptions thereto and to be heard upon such exceptions by the Secretary. Upon the taking of such exceptions it would be the duty of the Secretary to consider them, not perfunctorily but in the exercise of the administrative discretion conferred upon him. Such consideration may not be had as of June 14, 1933, but only as of the time when it is given. As the Court points out:

> "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps" (p. 20).

The concluding part of the procedure, namely, the Secretary's consideration of the respondents' exceptions to the findings and order prepared by the Secretary's subordinates, has not yet taken place and cannot take place until at some future date. Without it the hearing required by the statute as written and as interpreted by this Court has not been completed. No valid order may be made until its completion, and upon its completion such order manifestly may speak only as of the future and not as of a date prior to the completion of the hearing requisite to the validity of any order which the Secretary may make. Appropriate findings sufficient to sustain the order are again essential to its validity. As the Court points out in its opinion on second appeal and on rehearing, the findings made by the active prosecutors for the Government, and which the Secretary adopted, without notice to the respondents or opportunity to be heard, were "180 in number" and "elaborate". As the Court points out in its opinion on petition for rehearing, these "findings of fact necessary to sustain the order had not been made by him upon his own consideration" but had been prepared "by those who had prosecuted the case for the Government" and "were adopted by the Secretary". Such action, the Court said, failed "to satisfy the requirement of a full hearing". Unless and until the Secretary, after consideration of the record, and after hearing the respondents upon their exceptions to the findings prepared by such active prosecutors, which have now been served upon the respondents as a tentative report, has him-

self made such findings as he then thinks it proper to make, there has been no hearing and there can be no order. That this may not be done as of June 14, 1933, is apparent upon its face.

The prior opinions of the Court in this case, therefore, are a complete answer to the Government's contention that the Secretary's failure to accord to the respondents that full, fair and open hearing required by the statute as a condition precedent to the making of any effective order on June 14, 1933, may be cured by serving in 1938 as a tentative report the findings and order prepared by the Secretary's subordinates, which should have been served in 1933, by giving consideration in 1938 to the exceptions and objections of the respondents thereto, which should have been taken and maturely considered in 1933, and after so doing make an order not as of the date upon which such steps were taken, but as of a date five years prior thereto.

Appellants answer the above by saying:

> "the ultimate question is whether the Secretary's order correctly defines the substantive duty laid upon appellees by Section 305. If it does, the failure to accord them what this Court has defined as an essential part of a full hearing resulted in no substantive prejudice" (Brief, p. 65).

And, further:

> "His amended findings and order will serve to show whether, or to what extent, appellees were prejudiced by the invalidity of the initial proceeding" (p. 65).

And, further:

> "The further consideration of the Secretary, under a correct procedure, will show the precise amount of

> prejudice resulting from the earlier procedural error" (p. 67).

And, further:

> "Thus, a form of a full hearing in intended compliance with Section 310 has already been had. True, it was an erroneous form. The further proceeding will demonstrate whether or to what extent this error influenced the final result" (p. 67).

That such an amazing argument is made, rather well illustrates the desperate nature of the appellants' case. When the full hearing required by the statute has been denied, as this Court very plainly said, prejudice as a matter of law has resulted. The statute lays down no criteria or standards whatsoever to govern the determination of what are just and reasonable rates, and the Government has consistently advanced an argument in this very case, the acceptance of which would mean that the Secretary has *carte blanche* to make any rates he pleases so long as he considers all relevant factors. This was what Judge Van Valkenburgh below termed "almost dictatorial power" (R. 239). To talk in the face of these considerations about "the correct determination" and to allege that the Secretary's findings after full hearing will determine the precise amount of prejudice which has resulted to appellees from the denial of a full hearing is nothing short of sheer nonsense.

3. Unless an order made now ought to have been made then, it cannot be issued *nunc pro tunc* even in a court proceeding.

The appellants' entire argument necessarily rests upon the assumption that the Secretary may now "validate" his

invalid order of June 14, 1933, by the entry of a *nunc pro tunc*, pre-dated or retroactive order as of the same date. This argument is made despite the fact that the statute gives the Secretary, acting on his own motion, as he does here, power only to make an order "after full hearing" setting rates "thereafter to be observed" (Sec. 310).

As is well known, courts sometimes make what are known as *nunc pro tunc* orders. An examination of the authorities will show, however, that the circumstances under which these can be made are exceedingly circumscribed. It is only when the order could properly have been made at the time to which it is related back that a court is permitted to enter a *nunc pro tunc* order. 1 Black on Judgments (2d ed., 1902), Section 133. The sole legitimate purpose is to correct the record so as to make it speak the truth as to the order which was actually made (*Cf. Gagnon* v. *United States*, 193 U. S. 451). The power is to be exercised to correct clerical, not judicial, errors. Black, op. cit., *supra*, at Section 132.

On June 14, 1933, without according appellees a "full hearing" such as the statute requires, the Secretary issued the order which this Court has held invalid because of a "vital defect", not a mere "irregularity in practice" (304 U. S. 1, at p. 22). At that time he had not disclosed the issues or his claims and contentions to the market agencies and given them an adequate opportunity to argue the question before him. The findings contained in his invalid order had not been made by him after the consideration of the evidence which the statute requires, but by the "active prosecutors for the Government." It is his theory that he may now reopen the proceedings, accord to the market agencies the adequate opportunity to argue which he denied

them before June 14, 1933, consider the evidence and make a new order. Assuming the correctness of this theory, it is obvious that the status of the proceedings, now reopened, was on June 14, 1933, wholly incomplete. No order could have been made, much less ought to have been made, on that date. This Court has held that the order which was attempted to have been made on that date ought not to have been made. Thus, there is absolutely no room for the application of any *nunc pro tunc* doctrine to this situation. The only power which the Secretary then possessed, or now possesses, in a proceeding such as this instituted on his own motion is to fix rates for the future. Power to award reparation in such a proceeding is expressly withheld by the statute (Sec. 309(e)).

The fact is that the date June 14, 1933, has no legal significance. Upon the Secretary's own theory of his right to reopen the proceeding, he was then merely in the middle of a hearing. He could, with as much reason, date his new order in the fall of 1930, when the hearing was started, or as of the date when the taking of the evidence was completed, or as of any other prior date.

There are several other cogent reasons why a *nunc pro tunc* order will not hold water. First, it would be precisely equivalent to an order for the payment of money, since all it could possibly do would be to effect the release of the impounded funds to the rate-payers. The statute expressly provides that an order for the payment of money cannot be made on the Secretary's own motion (Sec. 309(c)). The proposed order admittedly could have no effect for the future, since the Secretary disclaims any intention of fixing rates for the future, he having on November 1, 1937, by agreement with the market agencies, fixed new and higher

rates for the future upon the basis of changed conditions (R. 191 *et seq.*).

Secondly, the provisions governing the method of obtaining reparations, which are similar to those in the Interstate Commerce Act, would be rendered useless and nugatory if the power claimed by the Secretary to make a *nunc pro tunc* order should be accorded to him. "Awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different." *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479, 486.[3] It is not jurisdictional, the Government claims, for the Secretary to fail to consider the evidence. Thus, any unauthorized subordinate might take the evidence and, without looking at it, the Secretary, on the Government's theory, could make an order jurisdictionally impeccable. If directly attacked and invalidated in the courts, the Secretary could announce that he would then consider the evidence. Having done so, he could date his order back, as he proposes to do in this case, to the time when his invalid order was made. Without having filed any reparation complaints, the rate-payers could collect for the period between the two orders from the funds

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[3]In the Interstate Commerce Act as originally enacted in 1887, all orders were enforceable under § 16 in equity by injunction, etc. (24 Stat. 384). Feeling that there was a constitutional right to trial by jury in reparation cases the I. C. C. refused to make reparation awards (*Council* v. *Western & Atlantic R. R. Co.*, 1 I. C. C. 638). The provision was therefore amended in 1889 to provide for actions at law and trial by jury in all cases where required by the Constitution (25 Stat. 869). The Hepburn Act of 1906 retained the provisions for enforcement by injunction of orders other than for the payment of money and enacted provisions for money awards and suits thereon similar to those which have been incorporated in the Packers and Stockyards Act (34 Stat. 590). Doubtless this history explains why Congress made the distinction in the Packers and Stockyards Act between orders legislative and judicial in nature, but whatever the reason, the distinction is clearly made.

impounded in court as a condition of staying the Secretary's first order. Following the Government's reasoning to its logical conclusion, the Secretary could do better than this. He could make an order without taking any evidence at all, and could, on the Government's theory, successfully assert its jurisdictional validity. Since reparation claims have to be established in the courts after obtaining an order from the Secretary (which constitutes only *prima facie* evidence), the rate-payers would be very foolish to follow the reparations route when the Secretary can take care of them by the more expeditious and certain method suggested by the Government.[4]

The employment of this method suggested by the Government would also render unnecessary the stay provisions of the statute which permit the Secretary to stay the effectiveness of filed tariffs for 60 days only. Since by the simple device of making a "snap order" the Secretary could fully protect the rate-payers, he would never have any occasion to employ the stay provisions.

On June 14, 1933, the Secretary could not have made an order prescribing for the future the rates attempted to be made by the order invalidated by the decision of this Court, or any other order predicated upon the findings con-

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[4]Since it is so very plain on the face of the statute that the Secretary cannot make the *nunc pro tunc* order he proposes to make, we have refrained from discussing the serious constitutional points which would be raised were such a construction of the statute possible: that is, whether or not there would be violation of Article III of the Constitution and the Seventh Amendment. Of course, it is elementary that statutes should be interpreted, if possible, so as to avoid serious constitutional questions. *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co.* v. *Boone*, 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Lucas* v. *Alexander*, 279 U. S. 573, 577; *Crowell* v. *Benson*, 285 U. S. 22, 62.

tained in the report and order of the Secretary as of that date. The proceedings having been instituted by the Secretary on his own motion (R. 21), the only power which the Secretary then or now possesses in such a proceeding is to fix rates for the future (Sec. 310). Power to award reparation in respect of charges made prior to the entry of a valid order is expressly withheld by the statute (Sec. 309(c)).

Power to make rates for the future may be exercised under the statute only "after full hearing" (Sec. 310). The Secretary's order was set aside by reason of the failure of the Secretary to accord to the commissionmen that "full, fair and open" hearing which the statute requires. This, the Court said, the Secretary had failed to accord because the order, and the findings essential to its validity upon which it was based, had been prepared by the "active prosecutors for the Government" and accepted by the Secretary without according to the commissionmen an opportunity to be heard thereon. Without departing from what it had said in its prior decision in respect of the service of tentative reports by administrative tribunals, the Court held that under the circumstances disclosed by the record in this case the Secretary was without power or authority to enter the order set aside, because the proposed order and the essential findings upon which predicated had not been served upon the commissionmen, and opportunity afforded to them to file exceptions thereto and to be heard thereon.

It is not to be contended and cannot be contended that on June 14, 1933, any such tentative findings and order had been served upon the commissionmen or any opportunity accorded to them to except thereto or to be heard thereon. On the contrary, on that date the Secretary purported to

enter and serve upon them the final order which the Court has invalidated. The theory of the appellants is that the so-called "procedural" defect may be cured by serving upon the commissionmen as tentative findings and tentative order, the findings and order theretofore entered and served upon them as a final order, and thus accord to the commissionmen the opportunity to except thereto and to be heard thereon, which the Court has ruled should have been accorded to them prior to the entry of any order on June 14, 1933. This having been done, it is the contention of the appellants that the Secretary may then enter in 1938 an order fixing rates for the future, not as of the date of its entry but as of June 14, 1933, or more than five years ago. Whether procedural defects, if any, and what kind, can be cured by *nunc pro tunc* orders of an administrative officer or tribunal, it is perfectly obvious that the order now proposed could not have been made on June 14, 1933. It is equally obvious that any order attempted to be thus predated cannot stand, and that in attempting to pre-date such an order to be made some time in the future, the Secretary would be acting as much outside of his authority as in the entry of the order set aside, because at that time the respondents had not been "apprised of the issues" they were required to meet, had not been served with a tentative report, or been given an opportunity to except thereto or to be heard thereon. By reason of these facts the Court held that there had been no hearing within the meaning of the statute. Hence the Secretary was on that date without power to enter an order reducing the rates and cannot now enter as of that date an order which he was then without authority to make.

Conceding the power of the Secretary to cure the so-called "procedural" defect by fulfilling the requirements of

the law through the service of his old findings and order, or any other findings and order which he may see fit to make, and affording to the respondents the right to except thereto and to be heard thereon, and having thus cured the so-called "procedural" defect to enter an order fixing rates for the future upon the evidence then before him—provided the record is not now too stale to support such an order (*Atchison, Topeka & Santa Fe RR. Co.* v. *United States,* 284 U. S. 248), or is properly supplemented, it is obvious that the requirements of a full hearing will not have been met until (1) the service of such a tentative order; (2) the submission of exceptions thereto; and (3) due and impartial consideration of the case *de novo* by the Secretary, as thus presented. None of these steps had been taken or could have been taken prior to the decision of this Court setting the old order aside. Conceding to the Secretary, therefore, authority to cure the so-called "procedural" defect, a full hearing will not have been had until all of these steps have been completed, and then, and then only, and from the date of the Secretary's determination of the issues *de novo* can an order fixing rates for the future be entered.

It is little short of ridiculous to suggest that the requirements of this Court's decision in this case can be met by the entry of a *nunc pro tunc* order. The absence of a full hearing at the time the order was entered cannot be supplied retroactively by according to the respondents the right to a full hearing now. Only after such a hearing has been had may the Secretary exercise the power conferred upon him to fix rates for the future. Since on June 14, 1933 the respondents had not been accorded a full hearing, the Secretary could not, under the facts of this case, have entered the order now proposed to be made *nunc pro tunc* as of that

date. Indeed, if the report and findings, and the Secretary's order then entered as a final order, had on that date been served upon the respondents, the Secretary could not have entered an order as of that date because the requirements of a full hearing as laid down by this Court in its decision could not have been met until the respondents had been given an opportunity to except thereto, and the Secretary had reached an independent judgment by a consideration of the case *de novo* in the light of the objections taken and the exceptions urged.

That the Secretary may not now enter a *nunc pro tunc* order as of June 14, 1933, or as of any other date, but only an order dated as of the time when actually made fixing the rates for the future, is also made manifest by a further consideration of the powers and duties of the Secretary as defined by the statute and the decision by this Court in this case. If by now serving the old report and findings upon the respondents, and giving them an opportunity to except thereto, it is the predetermined purpose of the Secretary to adopt the old findings and reenter the old order for the purpose of "validating" it, as indicated in the appellants' petition for rehearing to this Court (p. 14), then the case has already been prejudged and the Secretary's attempted effort to cure the "procedural" defect a mere sham. If such be the Secretary's purpose, then any order made in its pursuit would be as invalid as the old one and subject to the same infirmities.

If, on the other hand, it is the purpose of the Secretary to give impartial consideration to the exceptions and objections taken to the formal findings and order now served as a tentative report, then clearly there will have been no hearing until the Secretary determines the issues thus raised

and reached an informed judgment thereon. There can be no valid findings or order until his conclusions are embodied in a new report. As the Court declared in its prior decisions in this case, the order must be supported by findings essential to its validity, which, in turn, must be supported by evidence. The Secretary may not consider those matters which he should not consider, and must consider those matters which he should consider. Moreover, as said by the Court in both of its prior decisions in this case, the findings must be those of the Secretary himself and not those of his subordinates. Such are the duties of the Secretary, and no valid order may be made for the future until they have been exercised. They had not been exercised on June 14, 1933. They have not been exercised now. They cannot be exercised until some time in the future. Until they are exercised, no order may be made; and such order, when made, can speak only as of a date after their exercise and not before.

Again conceding, provided the old record has not become stale, or can in some way be adequately supplemented, that the Secretary may, in the proceeding instituted in 1930, make an order fixing rates for the future, one of three things may occur: He may, after performing for the first time the duty which the statute casts upon him and which the Court has unmistakably said he had not performed, reach, after having accorded to the respondents the hearing previously denied to them, the same conclusion which he reached before. Only in that event, even on the appellants' theory, could the Secretary enter any order *nunc pro tunc* which would affect the impounded funds. He may, after having for the first time accorded to the respondents that "full hearing" without which no order may be made,

conclude that the rates under investigation were not unreasonable and hence let them stand. Or, he may find that those reasonable rates to be prescribed for the future lie somewhere between the rates in effect at the time the proceeding was instituted and the rates prescribed by the order which has been set aside. Unless, as we have said, we are to assume that the case has been predetermined, and that its reopening for the purpose of giving consideration thereto is a mere sham, then it is clear that at the conclusion of the reopened proceedings the Secretary must consider, wholly independently of his prior order, whether the rates to be prescribed for the future shall be those under investigation, those prescribed by his previous order, or something else. Unless and until he determines these questions, he has not performed the duty cast upon him by the statute, the hearings are incomplete, and no order can be made.

Boiled down to its simplest terms, therefore, the contention of the appellees is that the Secretary may not make a *nunc pro tunc* order purporting to speak as of June 14, 1933, which he could not have made at that date. This is so even if, after according to the respondents the full hearing previously denied, he reaches the conclusion that if he had been in the position on June 14, 1933—which the Court has said he was not—to fix for the future the rates prescribed in the invalid order of that date, he would have done so. To accept such a view of the Secretary's powers would be to deny to the respondents in substance that right to a full, fair and open hearing *preceding* determination by the Secretary, without which, the Court has said, any order entered by him is a nullity.

The vice in the old order was that the findings upon which the order was predicated and which had been prepared by the "active prosecutors for the Government," were accepted by the Secretary without opportunity to the respondents to be heard in respect thereto. It is little short of absurd to suggest that by a re-adoption of these findings *after* hearing the Secretary may date them back to the date of the old order *before* hearing. We know no theory upon which the right either of a court or of an administrative body to enter a *nunc pro tunc* order can be extended to a case where no order could have been lawfully made as of the date from which it is attempted to be given effect.

4. Neither the *Atlantic Coast Line* case nor the other authorities cited by the appellants are in point.

The main authority upon which the Government seems to rely in arguing its claim that the Secretary is now empowered to validate his invalid order of June 14, 1933, as of that date, is *Atlantic Coast Line* v. *Florida*, 295 U. S. 301. This case presents a state of facts and lays down a rule of law so utterly different from the state of facts in our case and from any rule of law that can properly be applied to them that the weakness of the Government's argument is well demonstrated by its strong reliance on the case.

This Court in that case divided five to four. It is the majority opinion from which the Government purports to derive comfort. Even a casual examination of that opinion discloses its utter inapplicability to our situation. There the question was whether the Atlantic Coast Line could equitably retain collections which it was forced to make by reason of an order of the Interstate Commerce Commission increasing, because discriminatory against interstate

commerce, intrastate rates which had been fixed by the Florida Railroad Commission. The order of the I. C. C. was upheld in the statutory court. This Court reversed because, although discrimination against interstate commerce had been found by the Commission, it had neglected to make the necessary findings to support this ultimate conclusion (282 U. S. 194). During a period of about two years between the time that the Commission made its order and this Court set it aside the Railroad had collected the higher rates. Mr. Justice Cardozo, in his opinion for the majority, expressly stated (p. 315) that the question was not whether the Railroad, if it had given credit to the shippers, could now legally collect the higher rates from them, but that the sole question was whether it was equitable under all the circumstances to compel the Railroad to disgorge to the shippers. In determining that it was not, the majority felt that the equities were such that the courts ought not to take affirmative action.

In the first place, the learned Justice said (p. 313) that the rates fixed by the Florida Railroad Commission had been shown to be so low as to be confiscatory, so that the Railroad was entitled to higher rates.

In the second place, it appeared in the record that, after hearing more evidence and making new findings, the Interstate Commerce Commission had actually issued an order fixing the same rates for the future as it had fixed in its prior order, making the necessary findings to support the ultimate finding of discrimination. This Court held this second order of the I. C. C. to be valid (292 U. S. 1). *Such an order has, of course, not been made in our case and may never be made.* But if it should be, this would have no significance at all because of another vital difference between the

cases. At page 316 of his opinion, Mr. Justice Cardozo says:

> "The court surveys the years and discerns the same injustice, dominant at the beginning as well as at the end. Indeed, nowhere in the record is there a suggestion on the part of any one that during this long litigation there has been any change of conditions whereby a discrimination against interstate commerce illegitimate at one time would be innocent at another."

This furnished an additional equity in favor of the Railroad. Such an equity, assuming contrary to fact that equities are to be balanced in our case, is completely lacking in our case. The Secretary's order of November 1, 1937, increasing rates, is based upon an admission of changed conditions, and appellees do most emphatically claim a change of conditions during the period 1933-1937, as an affidavit filed by them with the Secretary shows (Appellants' Bf., p. 98). It is indeed common knowledge that during a period when the administration was widely heralding its desire to raise prices and when serious droughts occurred, very considerable changes in the selling prices of livestock, in the quantity of shipments made, and other factors affecting the reasonableness of commission rates took place.

A further equity noted by the learned Justice, and probably the crucial one, was the fact that the Railroad had no choice but to collect these higher rates under the compulsion of an order of the I. C. C. and an order of the statutory court refusing to set it aside.

The writer of the Government's brief, in making use of this case, immediately makes the blithe assumption that the Secretary in the reopened proceedings before him, now

incomplete,[5] will make the same order and fix the same rates as he did in his invalid order on June 14, 1933; in other words, that he will listen to the argument of the market agencies upon their exceptions as a matter of form and will arrive at the same conclusion, as may, of course, easily be done because there are absolutely no criteria or standards in the Act to govern the determination of reasonable rates.[6]

The above considerations make the case absolutely worthless for the Government. But it is further assumed that mere failure to indite detailed findings after having accorded a full hearing is equivalent to having denied a full hearing, although the detailed findings may in fact have been arrived at by the Commission despite the fact that they were not inserted in its order. In our case it will be remembered that this Court invalidated the Secretary's order because of a "vital defect" and not a mere "irregularity in practice."

But more fundamental, perhaps, than all of the above considerations is the fact that the occasion is completely lacking in our case for the application of any doctrine of balancing the equities. The court has no power to hold impounded funds after the cause before it has terminated. The impounded funds belong, and always have belonged, to the market agencies and were deposited only as security

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[5]This appears even if the facts stated in the extensive excursion *dehors* the record in appellants' statement (pp. 5-6, 7-9) are considered. This essential link in the chain is attempted to be supplied in a most absurd way; that is, by assuming that because the Secretary in an invalid order purported to find appellees' rates to be unreasonable (which findings it is incorrectly stated the District Court approved), they were in fact unreasonable.

[6]Indeed, the Government has consistently argued that the Secretary is free to make any rates he pleases so long as he considers all the relevant factors. We only suggest at this time that such a statute may not be immune to attack upon the ground of illegal delegation of legislative power.

to await an event which did not happen—the upholding in the courts of the Secretary's order. By the unambiguous terms of the temporary impounding order, they were entitled to have them back upon the Secretary's order having been declared invalid.

So much for the majority opinion. Four members of this court dissented. The fundamental basis of the dissenting opinion is that restitution was due because the finding of discrimination in the second order could not for any purpose relate back to the time of the original order which was void, and that whether void or voidable, the order gave the Railroad no right to collect the sums exacted. To so hold, in the opinion of the minority, would permit interference by the Federal Government with, and nullification of action in, a field exclusively within the State of Florida's sovereign power. The minority thought that equitable considerations had no place in the case because not to grant restitution would be, in effect, to deny legal rights.

It matters not, therefore, whether the majority or minority opinion is taken to be the law. It cannot even be disputed but that the market agencies collected the impounded funds under validly filed tariff rates which were maintained in effect by the temporary restraining order of the court. The demand of the Secretary, on behalf of the rate-payers who have never been parties to this case,[7] to have the court retain these funds so that, by validating his order, he may have them repaid to the rate-payers, is sup-

[7]This is a highly dubious claim. Of course when a bond is given against an administrative order being held valid, and it is held valid, the Secretary is the public representative of the intended third party beneficiaries. In this case, however, the attempt is to impeach the substitute for the bond, to wit, the impounding order, and not to collect upon it.

ported by no equities at all. Nor, if it were, would it make any difference, because the case is not one that calls for any balancing of the equities. The question simply is as to whether the market agencies are legally entitled to have their security back when the event has failed to occur against which they gave this security. As we have heretofore conclusively demonstrated, the argument that substantive rights can be enforced without complying with the fundamental procedural provisions of the Act will not wash. This being so, there is no argument left to support the claim of appellants to any rights or potential rights in the impounded funds.

Two decisions of the Appellate Division in New York, an intermediate court, are cited by appellants as authority for their position. Whether or not these cases are correct in view of the provisions of the New York Public Service Law and of the Civil Practice Act regulating the review upon certiorari, which completely differ from the provisions of the Packers and Stockyards Act, is hardly a matter for discussion in this brief, or one which the court will be likely to care to resolve. We undertake, therefore, only to point out a few very obvious differences. In the first place, as the Government admits, the review in these cases was direct by certiorari, and as the Government further admits in its brief there was express authority to remand the case directly to the administrative agency (p. 47). There is no such authority here, either express or implied, and the relationship between the statutory court and the Secretary of Agriculture is very different from what in New York under its statutes is the relationship between the courts and the Public Service Commission. A completely conclusive difference, however, lies in the contrast between Section 113 of the Public Service Law and the provisions of the Pack-

ers and Stockyards Act. The section referred to provides in part as follows:

> "§ 113. *Reparations and refunds; actions.* Whenever a public utility company, on its own initiative, shall file with either commission a schedule stating an increased rate or charge, and the commission shall enter upon a hearing concerning the propriety of such increased rate or charge, the commission shall by order require the interested company to keep accurate account during the pendency of the hearing, in detail, of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may, on application, by order require the interested company to refund, with interest, on or before a day fixed in the order, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified: * * *."

Thus it is plain that the Public Service Commission of New York acting on its own motion can award reparation whereas the Secretary of Agriculture cannot. This difference is, of course, vital. But as a matter of fact in neither New York case did the court declare that it was bound to direct a new hearing and retain the impounded funds pending its taking place. The action of the court in both cases was in pursuance of its discretion, a discretion which the statutory court in our case refused to exercise in favor of the appellants. Lastly, if anything more need be said, it does not appear in either of these cases that the matter of impounded funds was before the court at all, in one of the cases the security having been deposited with a lower court and in the other with the Public Service Commission.

Finally, it appears that the Government relies heavily upon the cases of *Mahler* v. *Eby*, 264 U. S. 32, and *Tod* v. *Waldman*, 266 U. S. 113. It is plain that these cases are of no significance. The order which the Secretary of Labor would make in the future in these deportation cases certainly was to have no retroactive effect. It was merely to carry out the deportation of the aliens. Further, it was to be judicial, not legislative, in character. In addition to this, what a court may do with respect to conditioning its decree in a *habeas corpus* proceeding, in which a prisoner is seeking his freedom, is entirely different from what a statutory court limited by its statutory powers to setting aside an administrative order, may do.

V.

Whether or not the rate-payers are now barred from obtaining reparations has nothing to do with the merits of this appeal and is a question extrinsic to the record.

Upon the wholly unwarranted and unsupported assumption[8] that the rate-payers have paid unreasonably high rates to the market agencies during the period June 14, 1933, to November 1, 1937, much of the Government's brief is devoted to an argument to the effect that the Court should strain every nerve to make the rate-payers whole.

Now, it is very plain that the courts have no power under this statute to protect the rate-payers generally against the consequences of their or the Secretary's failure to follow

[8]The entire basis for this assumption is the invalid order of the Secretary and the invalid action of the statutory court in sustaining it until directed by this court to invalidate it.

the essential procedural requirements of the statute. All that the statutory court can do is to provide, by insisting upon a bond or impounding, that rates higher than those provided for in an order of the Secretary shall not be finally reduced to possession until the order of the Secretary has been declared invalid. Under the statute the rate-payers had it fully within their power to protect themselves if they did not wish to rely solely upon the validity of the Secretary's proceedings instituted upon his own motion. They can file reparation claims with the Secretary within ninety days of the arising of the cause of action. In this case, however, they did not choose to follow that procedure. They chose to rely solely upon the impounding and upon the ultimate validity of the Secretary's order. Having done so, they have no complaint if their reparation claims are now barred.

The Government, however, insists that the reparation claims are not barred. The argument presented is ingenious, even if fallacious, but the point is not material. Whether or not these claims are barred does not affect the lack of power of the Secretary to make a *nunc pro tunc* order; nor the lack of power in the Court to hold the impounded funds while he proceeds to do so. Nor can it overcome the plain terms of the temporary restraining order which require that the funds be returned at this time.

Moreover, all talk of reparations is entirely beside the point until there has been a valid finding that the rates collected by the market agencies were unjust and unreasonable. There has been no such finding. The invalid order of the Secretary has no bearing at all upon this question. Obviously, neither has any finding of the District Court purporting to approve that order, whether on the basis of

the weight of the evidence or on the existence of substantial evidence, any continuing effect, now that its decrees have been reversed. As a matter of cold fact, however, the District Court held that the weight of the evidence on the two most important factors in the case, to wit, "salesmanship performance" and "business-getting and maintaining," was contrary to the findings of the Secretary (R. 241).

Notwithstanding the clearly indisputable facts set forth above, the Government continually talks about the necessity of the existence of some remedy in the rate-payers. This idea no doubt arises from unexpressed subconscious notion either that the Secretary's order, although declared invalid by this Court, was really valid, or the idea that the Secretary, from motives of self-justification, is bound to "validate" it in the reopened proceedings.

But the argument need not be continued. The question is not whether the rate-payers were ever entitled to reparations or whether they are now entitled to reparations; the question is what the Secretary can do when acting upon his own motion. It is clear that he cannot make a *nunc pro tunc* order having the effect of awarding reparations, whatever the situation of the rate-payers with respect to reparations may be.

It would seem to be evident, therefore, that the sole purpose of the argument to the effect that reparation claims are not yet barred is to persuade the Court that a ground of *equitable jurisdiction* exists, to wit, the prevention of a multiplicity of suits, and to induce the Court to conclude from that, despite the clear purpose of the temporary restraining order's provision for impounding, that an *equitable right* exists to have the impounded funds preserved in court for the benefit of the rate-payers. It is

hardly to be supposed that the Court will be deceived by such a transparent device.

VI.

The affirmance of the lower court's decision will result in no injustice and will in no way hamper the proper carrying on of administrative proceedings. Moreover, the consequences of any other decision in this case would be absurd.

There are some very simple answers to appellants' insistent argument with relation to the feared effect upon the conduct of administrative proceedings, if the lower court's order is affirmed. This matter of preventing the distribution of the impounded funds is, of course, an afterthought. Most certainly it was not conceived of at the time the temporary restraining order was issued because, if it had been (assuming the court has any power at all in the premises) the contingency might have been provided for. We need not speculate precisely how; but temporary restraining orders can be conditioned in various ways. The appellants take the position that "Any rule which extended immunity from regulation, if only the administrative agency could be convicted of procedural error, would immeasurably increase its burdens." The danger that the administrative tribunals would be forced to accede to the far-fetched demands of ingenious counsel, even though patently unsound, is suggested. The fact that in this case the exceedingly reasonable demand of counsel for a tentative report was refused, is ignored, even though the findings and order of the Secretary could easily have been used

as a tentative report as, in fact, they are now being used; and, further, even though the practice of tentative reports had been employed for years, with the approbation of this Court, by the oldest administrative tribunal, the Interstate Commerce Commission.

Thus, the Secretary, by refusing a tentative report or its equivalent by failing in any way to give proper notice of the issues or the Department's claims and contentions, denied what this Court has termed a "rudimentary requirement of fair play" and one which had been for many years a well-recognized part of orderly administrative proceedings. And this, although specifically demanded and perfectly convenient to accord. The Secretary also violated an equally well-known and fundamental right of litigants; that is, that the judge shall not confer with their opponents in secret without giving them the opportunity to answer. It is doubtful whether a member of the Bar could be found who would not realize the impropriety of this. Lastly, although the statute clearly delegated the deciding power to the Secretary and not to the Department, the Secretary failed to consider the evidence or to make the findings.

But aside from the fact that administrative tribunals need not anticipate difficulties in the courts if they will conform to the simple and well-recognized requirements of every-day fair play and justice as it is being administered in the courts, there is a simple but complete answer to appellants' contentions. Proceedings by the Secretary on his own motion are made by the statute purely prospective. The power to make prospective orders is supplemented by the power to stay tariffs filed by market agencies for a period of sixty days (Sec. 306(e)). It is also supplemented by granting the right to rate-payers to file reparation com-

plaints within ninety days from the time the cause of action arises. It may be that these times are too short, in view of the complexity of this particular type of proceeding; but one cannot quarrel with the statute which, after all, is what the Government is doing. If the Secretary feels that his legal staff cannot properly advise him as to the law relating to demands made by opposing counsel, he can enter a stay or in more involved proceedings suggest the filing of reparation complaints which will fully protect the past.

If, however, the doctrine argued for by the appellants should be adopted, the consequences in a case like this would be absurd.

Appellants' bald contention is that the statutory court had no power to order the return of the impounded funds to the market agencies which had deposited them as security to make refunds upon the happening of an event which failed to happen, to wit, a holding by the courts that the Secretary's order was valid. The claim is that these impounded funds *must* be held by the statutory court until such time as the Secretary may make a further order in the premises and until such further time as this order is either held valid in the courts or invalidated by reason of the fact that the Secretary's findings necessary to support the order are not supported by substantial evidence. This latter concession we feel to be a generous one, because it might equally well be argued that the Secretary in his prosecuting capacity should have a reasonable opportunity to develop evidence to support any findings lacking substantial support in the evidence already taken. He could then, if the evidence were obtained, re-assume his judicial capacity and make his order invulnerable against attack in the courts.

Overlooking, however, this rather serious consideration, and further overlooking the utterly specious distinction

between invalidation of an administrative order for fundamental "procedural" errors and invalidation "on the merits," let us consider what would happen if the Government's argument should be adopted. It is immediately obvious that by committing "procedural" errors the Secretary could keep these funds impounded not only throughout a second administrative proceeding, but indefinitely; because each time he received the case back he could in some respect deny a full hearing. When attacked in the courts, his order would be invalidated; but he could always insist upon another chance. Thus, it would follow that the market agencies could never get their impounded funds returned except at the pleasure of the Secretary.

Lastly it may be said that in one exceedingly important respect administrative tribunals are utterly different from courts. They combine the essentially antagonistic functions of prosecutor and judge; and as the decision of this Court in this very case plainly shows, they are subject to the strong temptation to improperly intermingle them, thereby doing great injustice to those whose activities they are authorized to control. If the doctrine contended for by the Government in this case should prevail, it would mean that at the pleasure of an administrative tribunal citizens could be compelled to bear the burden of an indefinite number of administrative proceedings.

The Secretary, of course, by the tenor and tone of the argument made for him by his counsel, seeks to assure this Court that he has learned his lesson and that appellees are certain to receive their full legal rights in the reopened proceedings before him. These proceedings are not a part of the record in this case, although the Government has seen fit to discuss in its brief (pp. 7-9) even proceedings which

have taken place since the allowance of this appeal. This having been done, we feel free to suggest that the Secretary, in his headlong rush to "validate" his prior order, has already made errors seriously prejudicial to the rights of appellees. Although he has appointed an examiner to take evidence concerning changed conditions in the years 1933-1937, he has refused to set aside the findings made on June 14, 1933, and invalidated by this Court (p. 98). He has required that the market agencies except to these findings and make argument before the examiner with respect thereto (p. 99). Apparently they are to be regarded as *prima facie* correct. In prescribing this procedure, moreover, he has rendered an opinion, after refusing to hear argument expressly demanded by the market agencies, in which he gives them a thirty-day period to take exceptions and point out any considerations overlooked by him (p. 99). Without waiting for the expiration of this thirty-day period, and over the protest of the market agencies, his examiner proceeds with the hearing and insists upon following the procedure laid down in this opinion (pp. 8-9). Thus, irrespective of his power to make a *nunc pro tunc* order, it would seem that the Secretary is well on his way toward the making of another invalid order.

It is argued that the doctrine requiring the exhausting of the administrative remedy before resort to the courts requires that the market agencies exhaust themselves in this further administrative hearing. And, of course, if the Secretary's second order be declared invalid, that they exhaust themselves in a third administrative proceeding. Coupled with the claim that the Secretary can make a *nunc pro tunc* order, this means that, no matter how many "procedural" rights are denied to the market agencies at the

behest of the Secretary's prosecuting arm, and no matter how fundamental these rights are, they can always be corrected *nunc pro tunc*—no matter how many administrative proceedings it takes to do it.

In other words, instead of an administrative tribunal's being compelled to grant to citizens whose activities it is investigating a full measure of their statutory rights, it may grant them as few as it desires, secure in the knowledge that, upon the inevitable invalidation of the administrative order in the courts, the "procedural slip" can always be corrected *nunc pro tunc*. Indeed appellants go further. They even suggest that when this Court has invalidated an order of an administrative tribunal for lack of evidence to support essential findings, the administrative tribunal may insist upon the *status quo* being maintained and the proceedings being reopened in order that it may go out and find the evidence. Having done so, it may then make an order *nunc pro tunc*. The consequences of the acceptance of such a doctrine upon the functioning of administrative tribunals may well be imagined.

PART TWO

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

VII.

This appeal, not being from "a final judgment or decree," but from a mere ministerial order which, upon the termination of the cause, was required by the unambiguous terms of a non-appealable temporary restraining order, this Court lacks jurisdiction.

1. The statute limits appeal to a "final judgment or decree." Since the order appealed from is not a "final judgment or decree," but is a mere ministerial order or direction to the Clerk authorizing the return of impounded funds such as was required by the unambiguous terms of a non-appealable temporary restraining order, which order or direction merely restores the *status quo ante* the temporary restraining order, this Court lacks jurisdiction.

Appellees here, who were petitioners below, applied to the statutory court for three types of relief against the enforcement of the Secretary's order: first, a temporary restraining order; second, a temporary injunction; and third, a permanent injunction (R. 17-18). A temporary restraining order, requiring the impounding as a condition, was granted to them upon the basis of their petition and in accordance with the statute (R. 129). Throughout the entire litigation this temporary restraining order or extensions thereof have remained in force with the acquiescence

or consent of the Government (R. 129, 130, 181). There was, therefore, never any necessity to press the demand for a temporary injunction.

The fundamental basis of the temporary restraining order, as recited therein, was "the right of the petitioners to collect rates and charges for stockyard services rendered under the schedule of rates and charges or tariffs now on file by petitioner with the Secretary of Agriculture" (R. 129). The order recites (R. 129):

> "that immediate and irreparable damage will result to petitioner"

unless an order

> "staying and suspending the enforcement, operation and execution of the order of June 14, 1933, of the defendant, Secretary of Agriculture, issue against the defendants."

This immediate and irreparable injury and damage is stated in the temporary restraining order to consist of two things: (1) that the Secretary of Agriculture will proceed to enforce the penalties provided for violation of said order by the Packers and Stockyards Act of 1921, and (2) will "otherwise proceed in derogation of the right of the petitioner to collect" the rates and charges in the filed tariffs. Thus, it is said (R. 129) that:

> "In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to petitioner."

The Court therefore enjoins the Secretary of Agriculture and his agents from enforcing his rates in derogation of or

> "in any wise militating against the right of the plaintiff to collect, demand, receive and retain rates and charges for stockyard services at the Kansas City Stock Yards in accordance with the schedule of rates and charges of petitioner now on file with the Secretary of Agriculture, provided, however, that the petitioner shall deposit with the Clerk of the Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect *and pending final disposition of this cause,* the full amount by which the charges collected under the schedule of rates in effect exceeds the amount which would have been collected under the rates prescribed in the order of the Secretary" (R. 130).

The statutory scheme of the Packers and Stockyards Act of 1921 is similar to that of the Interstate Commerce Act. Section 306 requires every market agency at a public stockyard to file and publish "schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard." It further provides:

> "No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public * * * ."

It further provides that

> "Whenever there is filed with the Secretary any schedule, setting a new rate of charge, * * * the secretary may either upon complaint, or upon his own initiative without complaint, * * * enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon

filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; * * * If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, *the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.*" (Italics ours.)

Civil and criminal penalties are provided for failure to charge tariffs which have been duly filed and have become effective (Sections 306, 307 and 308).

The Secretary of Agriculture never at any time stayed, or attempted to stay, the effectiveness of the tariffs filed by the market agencies. They went into effect May 11, 1932 (R. 2), and have been in effect throughout the entire period of this litigation, subject only to the obligation to make refunds equal to the excess collections in the event the Secretary's rates should be held valid. The temporary restraining order expressly prevented the Secretary's rates from going into effect and expressly protected the filed rates against interference. When the Secretary's rates were held invalid, no obligation to refund for the period of the impounding could ever thereafter exist.

The only appeals permitted by the statute to this Court are (1) from the granting or denying of a temporary injunction, and (2) from a "final judgment or decree." As

has been stated above, no temporary injunction ever issued in this case. On July 9, 1937, the statutory court entered its final decree which was appealed to this Court and reversed. This decree merely dismissed the petitions and made no provision for refunding (R. 180). This Court, for this reason we presume, refused to deal with the matter.

What comes before this Court now is not any "final judgment or decree," but a mere ministerial order or direction to the Clerk to release impounded funds belonging to appellees and which have always belonged to them. Such an order is not appealable. *Cf. Blossom* v. *The Milwaukee, etc. R. R. Co.*, 1 Wall. 655. This order merely carries out the unambiguous intent of the provisions of the temporary restraining order. Were there any question as to the construction of these provisions, however, the matter would not be one for this Court. The temporary restraining order was indisputably non-appealable; and if the appellants were dissatisfied with its terms their remedy was to insist on bringing on the motion for a temporary injunction, from the order granting which they could have appealed.

2. The order appealed from, unlike the decree in the *Baltimore and Ohio* case, is not a decree resulting from an equity proceeding in which one party has asked restitution from the other, but is a mere ministerial order or direction to the Clerk, upon the occasion ceasing for the maintenance of security, to return moneys belonging to a litigant.

In the *Baltimore & Ohio* case (279 U. S. 781) the east side (of the Mississippi) roads had been compelled, by the statutory court's refusal to set aside the I. C. C.'s order, to absorb charges for carriage across the Mississippi River

which, as this Court held, should be absorbed by the west side roads. The lower court construed the judgment of this Court as applying only to the future and requiring no restitution for the year or more the east side roads had been wrongfully compelled to absorb these charges to the benefit of the west side roads. Thereupon, a proceeding was brought in the lower court by the east side roads against the west side roads for restitution. The court denied restitution and this Court reversed. In every sense of the word this was an equity proceeding leading to a final decree ordering the west side roads to make the east side roads whole.

Our case is utterly different. With the issuance of the non-appealable temporary restraining order that equity proceeding, in which the deposit of the impounded funds was made, was brought to a conclusion. This temporary restraining order would have expired by limitation had the Government not acquiesced in its extension throughout the entire litigation. The impounding could only have been continued under a temporary injunction, the granting of which would have been appealable. When pursuant to this Court's mandate the statutory court entered its decree for a permanent injunction against the Secretary's order of June 14, 1933, the temporary restraining order was no longer required. All there remained for the court to do was to restore the *status quo* by returning to the market agencies the impounded funds put up as security for something which never happened, to wit, a holding in the courts that the Secretary's order was valid. Such a ministerial order, direction or instruction to the Clerk is certainly not a final decree in an equity suit. The terms of the temporary restraining order are unambiguous and obviously are subject to no other construction but one requiring, when such

temporary restraint is no longer needed, the return of the impounded funds which were deposited as a condition of obtaining the temporary restraining order. But were there ambiguity, it would be too late for appellants to complain. Having acquiesced in the impounding continuing pursuant to a non-appealable temporary restraining order and never having insisted upon the market agencies applying for a temporary injunction from which an appeal could be taken, they are now foreclosed.

3. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is strictly consistent with the mandate of this Court. In reality, however, it was not required by the judgment or mandate of this Court, which reversed a decree containing no provision relating to the impounded funds, but is an order to which appellees became immediately entitled when the judgment of this Court absolved them from the necessity of maintaining a temporary restraining order in force.

In the *Baltimore & Ohio* case (279 U. S. 781), after this Court had reversed the decree of the lower court refusing to set aside the I. C. C. order requiring the east side roads to absorb the trans-Mississippi charges, the lower court entered a decree denying restitution, which decree failed to carry out the full intention of this Court's judgment and mandate. In our case the decree of July 9, 1937, which was appealed from and which this Court reversed, made no provision whatsoever concerning the impounded funds. It merely decreed that the petitions for injunction should be dismissed. Thus this Court did not have before it any question concerning the impounded funds. Although upon petition for

rehearing it was specifically requested by the Government to include a direction in its mandate concerning the impounded funds, this Court expressly refused to do so.

From the foregoing it is obvious, therefore, that the lower court's order releasing the impounded funds cannot possibly lack conformity with the mandate of this Court. It is wholly consistent with it, although it does not, properly speaking, flow out of it. In truth, it flows out of the lack of further necessity for the temporary restraining order by reason of the granting of a permanent injunction.

4. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is not a decree which is part of or incidental to the appealable final decree in the main suit; it is a mere ministerial order, direction or instruction to the Clerk incidental to the termination or the dissolution of a non-appealable temporary restraining order.

In the *Baltimore & Ohio* case (279 U. S. 781) one of the three reasons given for sustaining the jurisdiction of this Court was that the decree appealed from was incidental to and a part of the main suit. While we think it clear that this reason can not be considered apart from the other two, it seems rather plain that it does not apply to our situation in any event. In the *Baltimore & Ohio* case the auxiliary decree of restitution was intended by this Court to be made by the lower court as an integral part of its decree deciding that the east side roads should not be required, but had been required, to absorb the trans-Mississippi charges to the benefit of the west side roads. Since this Court's decision was not only that this absorption should not be required for the future but that restitution should be made for the past, it is obvious that the

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two decrees were part of one whole. In our case, however, the non-appealable temporary restraining order was not a part of the appealable decree which refused a permanent injunction. The funds impounded as a condition of obtaining the temporary restraining order are not even mentioned in that decree (R. 180). The order appealed from which released the impounded funds is in turn not a part of or incidental to the main suit but is a part of and incidental to the non-appealable temporary restraining order.

Even, therefore, assuming that this reason given in the *Baltimore & Ohio* case can be taken out of its context and separately employed, it is clear that this Court fails of jurisdiction.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed or in the alternative that the order of the statutory Court should be affirmed.

Respectfully submitted,

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APPENDIX

Packers and Stockyards Act of 1921, as amended.

(7 U. S. C., c. 9, Sections 181-229; c. 64, 42 Stat. 159, et seq.)

Title III.—Stockyards

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give

notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.[1] It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided,* That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to

[1]Amended by an act of Congress approved May 5, 1926.

comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less

than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a

stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under

this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's

fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or han-

dling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set

aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.